UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS HUGHES, JR.,	)	
Appellant,	)	
vs.	)	No. 20955
UNITED STATES OF AMERICA,	)	
Appellee.	)	
	)	

APPELLANT'S OPENING BRIEF

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I N D E X

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the District of Nevada, adjudging the Appellant guilty as charged in Count I of the Indictment.

The offense occurred in the District of Nevada. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF PLEADINGS AND FACTS

The Appellant, on May 6, 1965, was charged in a two count Indictment in the United States District Court for the District of Nevada with violating Title 21, United States Code, Section 174 [R.4-5].[1]

1. "R" refers to Record on Appeal

The Appellant, prior to trial, filed a Motion to Suppress Evidence [R.6-10]. A hearing on Appellant's Motion to Suppress Evidence was held on September 23, 1965 [R.11] [R.T.M.S.2-80][2].

The trial Court granted Appellant's Motion to Suppress Evidence of narcotics referred to in Count II of the Indictment [R.12], and the Government dismissed Count II of the Indictment [R.T.3][3]. The jury found the Appellant guilty as charged in Count I of the Indictment [R.16].

The Appellant filed a Motion for Judgment of Acquittal Or In The Alternative For A New Trial [R.21-22] which was denied by the Court on November 15, 1965 [R.3].

The Appellant was sentenced on December 13, 1965, and Judgment of the jury's verdict was entered [R.26]. The Appellant was sentenced and committed to the custody of the Attorney General for a period of five years [R.3,25]. The Appellant filed his Notice of Appeal on December 13, 1965 [R.27,28].

The trial Court granted the Appellant various extensions of time in which to docket the Record on Appeal [R.32-37].

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2. "R.T.M.S." refers to Reporter's Transcript Motion to Suppress
3. "R.T." refers to Reporter's Transcript of Trial Proceedings

STATEMENT OF THE CASE

Detective Sergeant John McCarthy, of the Las Vegas, Nevada Police Department, placed Appellant's house, at 1708 Carey Street, Las Vegas, Nevada, under surveillance at approximately 8:15 p.m. on April 22, 1965 [R.T.50-52]. Some minutes earlier, Detective McCarthy had been contacted by his partner, Detective Staten [R.T.51], that the Appellant's 1965 Plymouth two-door car was parked in front of a pool hall in West Las Vegas [R.T.22], that Detective Staten had parked across the street from the pool hall and noticed Appellant's car there [R.T.24].

Detective Staten began the surveillance of Appellant's apartment at approximately 8:15 p.m., and Detective McCarthy relieved him at 9:15 p.m. [R.T.52]. The detective was located some 500 feet away from the Appellant's residence [R.T.52] and was viewing the residence through high-powered binoculars [R.T.53]. Detective McCarthy was in an unmarked police car [R.T.55].

Detective McCarthy had known the Appellant for approximately six years prior to this time. When the initial surveillance was effected at 8:15 p.m., the Appellant's car was parked in front of his residence [R.T.73]. At approximately 10:15 p.m., the Appellant came out the front door of his residence and walked to the curb where his car was parked

[R.T.53]. The Appellant was wearing a light-colored Levi jacket, a red sweater-shirt and bedroom slippers [R.T.55]. Detective McCarthy observed the Appellant walk from his residence to where his vehicle was parked. The Appellant appeared to be carrying some object in both hands across his stomach [R.T.54]. The Appellant looked up and down the street as he approached the sidewalk, walked around to the driver's side of the car, opened the door, bent over and put something underneath the front seat of the car [R.T.54-55]. The Appellant then got into the car, started the car up, and headed west on Carey Street to Comstock, where he made a left turn and headed in the direction where Detective McCarthy was parked [R.T.55].

Detective McCarthy was seated in his vehicle facing the Appellant after the Appellant had made a left turn onto Comstock. Detective McCarthy drove his car forward, made a U-turn and followed the Appellant. He turned on a red light, at which time the Appellant pulled his vehicle over and stopped [R.T.56]. The Appellant kept the speed of his vehicle constant [R.T.77].

Detective McCarthy got out of his car, walked over to the Appellant and asked him how he was [R.T.56]. There was no one else present at this time but the Appellant and

Detective McCarthy. Detective McCarthy felt the Appellant knew him since he had talked to him in the past [R.T.57,78-79].

When Detective Staten arrived, the Appellant was seated behind the steering wheel of his car. The Appellant was asked if he had been down to the pool hall, which he denied [R.T.57]. Small talk was exchanged and Detective McCarthy asked the Appellant, "If he would object if we searched him". The Appellant made no response, but he got out of his car. The Appellant took everything out of his pockets, laid the contents on the hood of his car and was patted down by Detective McCarthy.

The Appellant was not under arrest at that time. After he was searched, the Appellant was told to put his personal belongings back into his pockets [R.T.80]. Then Detective McCarthy asked the Appellant if he had any objection to Detective McCarthy's looking into his car. Appellant replied, "Go right ahead". Detective McCarthy sat in the driver's seat of the car, ran his hand up under the dashboard, attempted to open the console glovebox and asked Appellant's assistance in opening the console. Detective McCarthy reached under the seat on the driver's side and found a two-ounce Maxwell House Coffee jar [R.T.59]. After the jar was found, the Appellant was asked if he had more, and the Appellant replied in the negative and said that he did not know what

the Detective was talking about [R.T.61].

Detective McCarthy, after finding the Maxwell House Coffee jar, which was marked and admitted into evidence as Exhibit 6 [R.T.33,102], did not open the jar until after the Appellant had been placed under arrest. However, he did look at the contents of the jar and observed colored toy balloons [R.T.66-67]. Eleven balloons containing No. 5 capsules were found in the jar [R.T.59-61]; and the capsules, after a field test, were found to contain narcotics [R.T.13,69].

Detective McCarthy replaced the jar and its contents in the spot where he found it. The Appellant was then placed under arrest. It was not until after the Appellant was arrested that the capsules and the balloons inside the Maxwell House Coffee jar were tested for narcotic origin.

The Appellant rested his defense, in part, on the testimony of Louis Lee Crockett that the Appellant had returned from a trip to Phoenix, Arizona on April 22, 1965 [R.T.143], entered his residence at approximately 8:20 p.m. [R.T.144], and never left his residence that entire day. The Appellant slept the entire day [R.T.157] and left his house for the first time that day at about 10 p.m. [R.T.159]. Louis Crockett took the Appellant's automobile on the morning of April 22, 1965, and left it for Appellant's brother, Willie Hughes [R.T.144-145] Willie Hughes obtained possession and keys to the car from

Louis Crockett in front of a pool hall, and the car was returned to the Appellant at about 8:30 p.m. on the evening of that day [R.T.123-125].

The Appellant moved for a Judgment of Acquittal when the Government rested its case in chief [R.T.103,117]. The Court denied the Appellant's Motion [R.T.103,117]. The Appellant filed a written Motion to View Premises [R.17-18] and submitted argument in support of the Motion [R.T.233-235]. Thereafter, when all the evidence was closed, Appellant again moved the Court for Judgment of Acquittal [R.T.235]. The Motion was denied by the trial Court [R.T.237]. After a verdict had been entered by the jury finding the Appellant guilty as charged in Count I of the Indictment, the Appellant filed a Motion for Judgment of Acquittal Or In The Alternative For A New Trial [R.19-23]. The trial Court denied the Motion on December 15, 1965 [R.8].

SPECIFICATIONS OF ERROR

1. The trial Court abused its discretion in denying Appellant's Motion to View Premises.

2. The trial Court erred in denying Appellant's pretrial Motion to Suppress as evidence the narcotics alleged in Count I of the Indictment.

3. The trial Court erred in not granting Appellant's Motion for Judgment of Acquittal at the conclusion of the Government's case in chief and the close of all evidence.

4. The trial Court erred in denying Appellant's

Motion for Judgment of Acquittal or Judgment for a new trial.

S U M M A R Y

The Appellant was indicted, tried and convicted for violating Title 21, United States Code, Section 174.

The Appellant contends that the trial Court abused its discretion in denying Appellant's Motion to View Premises whereby the testimony of the two arresting officers would have been strongly impeached. Additionally, the Appellant urges that he did not consent to a search of his vehicle by Detective McCarver and that the fruits of the search should not have been admitted into evidence.

A R G U M E N T

I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VIEW THE PREMISES

The Appellant filed a written Motion to View Premises [R. 17-18]. The theory, or reason for the Motion, was to show that it was visually impossible for Detective Staten to view or observe the Appellant in the S and W Pool Hall as he had testified [R.T. 22, 24, 34 - 35, 199, 203 -205, 208], and that terrain feature and surveillance distance would not enable Detective McCarthy to observe the Appellant. The

Trial Court, after argument on the Motion, denied the Motion [R.T. 233 - 235].

It is discretionary with the Court, whether or not the jurors may visit the scene of a crime. C.I.T. Corporation v. United States, 150 F. 2d 85 (9th Cir. 1945); Neufield v. United States, 118 F.2d 375 (U.S.C.A. D.C. Cir. 1941). There are few legal precedents construing or defining what constitutes an abuse of discretion in denying a Motion to View Premises. The Fifth Circuit in Le Prell v. United States, 192 F.2d 132 (1951) placed significance on whether the matters which the jury could have seen by viewing the premises were the subject of full testimony. In United States v. Pagano, 207 F.2d 884 (2nd Cir. 1953) and Neufield v. United States, supra, the appellate courts held there was no abuse of discretion because photographs informed and illustrated to the jurors what they would observe upon viewing the premises.

The government justified Detective McCarthy's stopping the Appellant [R.T. 56] on information supplied to Detective McCarthy by Detective Staten [R.T. 24 -25, 51]. That Staten observed the Appellant in the S and W Pool Hall in the company of other narcotics users [R.T. 24]. Detect-

ive Staten testified he looked through the door of the Pool Hall when he observed the Appellant [R.T. 48], that the pool Hall had a glass front, but it was boarded up [R.T. 36]. Detective Staten testifying in rebuttal states he observed the Appellant both through the door [R.T. 200] and through the window [R.T. 208].

Simon Walker, the owner of the S and W Pool Hall, testified as a witness for the Appellant that the lower surface of the pool hall's front window was completely covered [R.T. 187] to a height of six feet and that he could not see into the pool hall [R.T. 188], thus contradicting the testimony of Detective Staten.

Detective Staten also testified that he observed the Appellant in the pool hall from a surveillance point at a service station across the street from the pool hall [R.T. 24]. This testimony was also contradicted by Simon Walker who testified that he could only observe silhouettes in the pool hall from the same position [R.T. 192].

Detective Staten provided Detective McCarthy with information upon which the government relies as the basis for stopping the Appellant. Staten's testimony was contradicted by Simon Walker. The condition of the pool hall at

the time of trial was unchanged from April 22, 1965. [R.T. 186]. If it were visually or physically impossible for Staten to observe the Appellant in the pool hall, then the jury was entitled to know. The jury could only determine the physical facts from a view of the premises.

The area immediately in front of the Appellant's residence, and Detective McCarthy's surveillance point, were also included in Appellant's Motion to View Premises [R. 17 - 18]. The Appellant wanted to show the jury, from a view of the premises that Detective McCarthy could not, from his surveillance point, observe the Appellant leaving his apartment carrying an object in his hand and placing the object under the driver's seat of his automobile. The visual surveillance of Detective McCarthy took place in the night time [R.T. 51 - 53], thus, if the jury viewed this area and concluded that Detective McCarthy could not visually observe the Appellant, then the only logical conclusion to be drawn from stopping the Appellant would be lack of justification.

The government did offer photographs of the area that were received into evidence as exhibits 10 and 11 [R.T. 215 - 220]. These photographs, it is submitted, did

not show the jury what they would have observed from Detective McCarthy's surveillance point viewing the Appellant's residence.

The physical condition of the S and W Pool Hall was not fully testified to. The testimony of the witnesses for both the government and the defense could only leave doubt in the minds of the jurors. This doubt and confusion could only be completely removed by the jury's inspection and view of the S and W Pool Hall. Similarly, whether the Appellant could be observed, as testified to by Detective McCarthy, could, in the absence of Detective McCarthy's testimony, only be shown or proved by the jury's visual observation of the Appellant's residence from the surveillance point used by Detective McCarthy.

II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS AS EVIDENCE THE NARCOTICS ALLEGED IN COUNT I OF THE INDICTMENT

The Appellant filed a pre-trial motion under Fed. R. Crim. P.41 (e) to suppress as evidence the narcotics alleged in both counts of the Indictment [R.6-10]. The trial Court, after a hearing on the motion [R.T.M.S.2-80], denied Appellant's motion with respect to Count I and granted the motion with respect to Count II [R.12].

The evidence at the hearing on the Motion to Suppress

showed Detective McCarthy of the Las Vegas, Nevada Police Department, on April 22, 1965, had placed the Appellant's residence at 1708 Carey Street, Las Vegas, Nevada, under surveillance. The surveillance was initiated at 9:00 p.m. on that date. The Appellant's 1965 red Plymouth two-door sedan was parked in front of the Appellant's residence during the surveillance [R.T.M.S.4-6].

Detective McCarthy observed the Appellant from a distance of 300 yards by using binoculars. The Appellant left his residence at 10:00 p.m. and appeared to be carrying something in his hands. The Appellant walked to the driver's side of his car, opened the door and appeared to reach under the seat. The Appellant then got into his car, drove away, and headed in the direction where Detective McCarthy was stationed [R.T.M.S.4-8].

The Appellant drove by Detective McCarthy and apparently recognized McCarthy. Detective McCarthy then made a U-turn in his unmarked police vehicle and followed the Appellant for approximately three blocks. Detective McCarthy applied a red light and the Appellant pulled over to the side of the road. McCarthy got out of his car and walked to the Appellant's car. McCarthy asked the Appellant to get out of his car, which the Appellant did. The Appellant

knew Detective McCarthy was a police officer from prior dealings. The Appellant was asked to remove the contents of his pockets and place the items on the hood of his car. The Appellant was then patted down [R.T.M.S.9-11].

At that point, the following discussion took place [R.T.M.S.12]:

"Q. Did you have any discussion with the Defendant at that point?"

"A. I asked him if he objected if I looked in his car and he said, 'No, go right ahead'."

"Q. Did you specifically tell him with regard to looking in his car?"

"A. I asked him if I could, if he had any objection if I looked in the car and he said, 'No.' "

Detective McCarthy testified he told the Appellant he wanted to search his car for "stuff" [R.T.M.S.13]. The Appellant was not at that time under arrest nor was he advised he did not have to allow a search of his car [R.T.M.S.14]. By McCarthy's testimony, the Appellant, in reply to McCarthy's request to search, stated, "Go right ahead" [R.T.M.S.14]. McCarthy entered Appellant's car and conducted a search of the car. McCarthy found a two-ounce Maxwell House Coffee jar underneath the front seat of Appellant's car. Appellant

denied knowledge of the jar and, at that point, Appellant was placed under arrest [R.T.M.S.17].

The jar contained differently colored toy balloons [R.T.M.S.29]. The contents of the jar were not subjected to narcotic field tests at the time of the arrest [R.T.M.S. 33].

The Appellant testified at the hearing on the Motion to Suppress. His testimony corresponded with Detective McCarthy's testimony up to the time Appellant's car was searched [R.T.M.S.35-38]. According to the Appellant, McCarthy entered his car and was searching the car before the Appellant had the opportunity to protest [R.T.M.S.38].

The Appellant contended at the hearing on the Motion to Suppress, and still contends, that he was effectively arrested when initially detained by Detective McCarthy [R.T.M.S.10-12], and the narcotics found in the Maxwell House Coffee jar should have been suppressed as the fruits of an illegal search and seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The facts then available to Detective McCarthy did not constitute sufficient probable cause by any standard for restricting the Appellant's movement. There was no showing the Appellant had violated any law and that his actions were as innocent

as the actions of any citizen.

There were no facts developed at the hearing on the Motion to Suppress to warrant a belief by Detective McCarthy that the Appellant had committed an offense. When the Appellant's movement and liberty were restricted by Detective McCarthy, his arrest was complete. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed 2d 134 (1959). The circumstances surrounding Appellant's arrest appear similar to Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 11 L.Ed 2d 604 (1964) where, after Beck's warrantless arrest without probable cause, followed by a search, incriminating evidence was discovered which the Supreme Court of the United States held was inadmissible.

Although the Court did not make findings when it ruled on the Motion to Suppress, the Court did make findings during the trial that there was no arrest when the Appellant was stopped, that Appellant gave a valid consent to search his vehicle, and the ensuing search and seizure was not unreasonable [R.T.116-117]. Assuming this finding was the basis for the Court's denying Appellant's Motion to Suppress, it is contended that Appellant did not consent to the search of his vehicle, as established by judicial guidelines. A consent to search is not to be lightly inferred. United

States v. Viale, 312 F.2d 595 (2nd Cir. 1963). The presumption is against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937).

The credibility of Detectives McCarthy and Staten and the Appellant is not controlling. The real issue is whether the evidence offered by the government meets the standard required. This Circuit in United States v. Page, 302 F.2d 81, 83-84 (1962) announced judicial guides for use in determining whether a consent to a search was, in fact, given. The consent must be unequivocal and specific and freely and intelligently given. It must be shown that the individual has waived his rights. Coercion, implicit in situations where consent is given under color of badge, must be shown not to exist.

The Appellant, while driving his automobile, was pulled over after a red light was applied by Detective McCarthy [R.T.M.S.10]. The Appellant, from prior dealings, knew McCarthy was a police officer [R.T.M.S.11]. Appellant was required to remove himself from his car, empty his pockets and was patted down [R.T.M.S.10-11]. This was all done under color of badge.

McCarthy asked Appellant if he [Appellant] objected

if he [McCarthy] looked in his car [R.T.M.S.12]. The word "look", and not search, was used by McCarthy. The Appellant was not specifically told, other than use of the word "stuff", what McCarthy was looking for. Based on these facts and circumstances, the Appellant could not have given a clear and unequivocal consent to McCarthy. If McCarthy is believed, the consent was obviously not freely given. This Circuit in Channel v. United States, 285 F.2d 217 (1960), quoted with approval, Higgins v. United States, 93 U.S. App. D.C. 340, 209 F.2d 819:

> "It follows that . . . words or signs of acquiescence in the search accompanied by denial of guilt, do not show consent; . . ."

The Appellant squarely denied giving Detective McCarthy consent to search his vehicle [R.T.M.S.37-38]. The Appellant's denial vitiates the alleged consent given to Detective McCarthy. The consent allegedly given by this Appellant is not as strong as the consent given in Channel v. United States, supra, and State of Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), which required reversal. "The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." Cipres v. United States, 343 F.2d

95, 98 (9th Cir. 1965).

State law controls on the issue of the validity of an arrest without a warrant absent an applicable federal statute. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L. Ed. 210 (1948). The Appellant's arrest, by either the Appellant's theory or the trial Court's theory, took place in Las Vegas, Nevada [R.T.M.S.4,17,30]. The applicable Nevada Statute, N.R.S. 171.225,[4] defines arrest and N.R.S. 171.230[5] defines how an arrest is made.

The Appellant was restrained of his liberty and movement by Detective McCarthy. No facts were established that justified Detective McCarthy's stopping the Appellant. Unlike Lipton v. United States, 348 F.2d 591 (9th Cir. 1965), no testimony was adduced that Nevada is an automobile-license state; and Appellant's car was subject to the vehicle code. There was no testimony that Detective McCarthy looked into Appellant's car and observed the narcotics, thereby giving him probable cause which would place the case under Busby v. United States, 296 F.2d 328 (9th Cir. 1961).

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4. N.R.S. 171.225-"An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."
5. N.R.S. 171.230-"An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention."

The facts do, however, fall within the scope of Porter v. Wilson, 245 F. Supp. 396, (U.S.D.C.N.D. Calif. S.D. 1965), in his opinion, District Judge Weigel, refuses to draw a distinction between detention for inquiry or interrogation and arrest. If there is detention of an individual, there must be reasonable justification for the detention. Most certainly, the evidence before the trial Court did not reflect reasonable justification for the Appellant's detention, prior to his arrest, and the fruits of the search, following the detention and prior to the arrest should have been suppressed. Further, detention without reasonable justification would indicate that a consent given during such detention would be coerced. Martinez v. United States, 333 F.2d 405 (9th Cir. 1964) (Koelsch, C.J., dissenting).

III & IV

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE IN CHIEF AND THE CLOSE OF ALL EVIDENCE. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR JUDGMENT FOR A NEW TRIAL.

The Appellant, at the close of the government's case in chief, moved the Court for a Judgment of Acquittal.

The motion was denied [R.T.103-117].

The motion was based on the Appellant's prior Motion to Suppress and on the fact it was not determined that the jar found in Appellant's vehicle contained narcotics until after Appellant's arrest. Detective McCarthy, after discovering the Maxwell House Coffee jar, did not open it, but merely looked at it and saw colored toy balloons [R.T.66-67]. There was no field test conducted at that time and prior to Appellant's arrest. McCarthy showed the jar to the Appellant [R.T.61] and then replaced the jar in its finding position and arrested the Appellant [R.T.61-62].

After the Appellant's arrest, it was determined for the first time by a Marquis Reagent Test that the capsules found in the toy colored balloons contained heroin.

The mere discovery of the Maxwell House Coffee jar under the driver's seat of the vehicle does not establish probable cause for Appellant's arrest. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), Wong Sun v. United States, supra. The Appellant's arrest was not justified by the discovery of heroin in the Maxwell House Coffee jar. Henry v. United States, supra

Accordingly, the trial Court erred in not granting Appellant's motions for Judgment of Acquittal made during

the trial [R.T.103-117] at the close of all evidence [R.T. 236-237] and the alternative motion for a new trial [R.19-23, 8].

C O N C L U S I O N

The trial Court erred, and the Judgment, accordingly, should be reversed.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Raymond E. Sutton, Esquire

Respectfully submitted,

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